



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *J. L. v. Minister of Employment and Social Development*, 2016 SSTADIS 299

Tribunal File Number: AD-16-13

BETWEEN:

J. L.

Appellant

and

**Minister of Employment and Social Development
(formerly known as the Minister of Human Resources and Skills
Development)**

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Janet Lew

DATE OF DECISION: August 5, 2016

REASONS AND DECISION

OVERVIEW

[1] This appeal is about whether there are any circumstances whereby an appellant is entitled to receive a Canada Pension Plan disability pension after already having started to receive a Canada Pension Plan retirement pension.

[2] On September 21, 2015, the General Division summarily dismissed the Appellant's appeal of a claim for a disability pension, on two grounds: (1) she could not receive a Canada Pension Plan retirement pension and a disability pension at the same time, and (2) on the facts before it, she could not cancel the retirement pension in favour of a disability pension. The Appellant filed an appeal of the General Division's decision with the Appeal Division on December 22, 2015. The Social Security Tribunal wrote to the Appellant, requesting her to identify any grounds of appeal. She requested that the Appeal Division consider her extenuating personal circumstances.

[3] No leave is necessary in the case of an appeal brought under subsection 53(3) of the *Department of Employment and Social Development Act* (DESDA), as there is an appeal as of right from a summary dismissal issued by the General Division. As I have determined that no further hearing is required, this appeal is proceeding pursuant to subsection 37(a) of the *Social Security Tribunal Regulations*.

FACTUAL BACKGROUND

[4] The key facts for the purposes of this appeal are as follows. The Appellant began receiving a retirement pension in April 2011. On June 13, 2013, more than two years after she began receiving her Canada Pension Plan retirement pension, the Appellant made an application for a Canada Pension Plan disability pension.

GENERAL DIVISION DECISION

[5] The General Division summarily dismissed the Appellant's appeal. The General Division noted that, under paragraph 44(1)(b) of the *Canada Pension Plan*, a person cannot simultaneously receive both a Canada Pension Plan retirement pension and a Canada Pension Plan disability pension. The General Division noted that, under subsection 66.1(1.1) of the *Canada Pension Plan*, a person deemed to be disabled before the month that the retirement pension became payable can cancel that retirement pension and receive a Canada Pension Plan disability pension instead.

[6] The General Division also noted that, according to paragraph 42(2)(b) of the *Canada Pension Plan*, a person cannot be deemed disabled more than 15 months before the date the application for a Canada Pension Plan disability pension was received.

[7] The General Division found that the effect of these provisions is that the *Canada Pension Plan* does not allow the cancellation of a retirement pension in favour of a disability pension when the disability application is made fifteen months or more after the retirement pension began to be paid. On the facts before it, the General Division determined that, as the Appellant had applied for a disability pension on June 13, 2013, the earliest that she could be found disabled would be March 2012. The Appellant's earliest possible deemed date of disability fell after the commencement date of her Canada Pension Plan retirement pension in April 2011. Given the provisions of the *Canada Pension Plan*, the General Division determined that the Appellant could not cancel her retirement pension in favour of a Canada Pension Plan disability pension.

ISSUES

[8] This appeal raises two primary issues:

1. Did the General Division fail to consider any basis upon which the Appellant could have qualified for a disability pension?
2. Was a summary dismissal appropriate?

SUBMISSIONS

[9] In her notice of appeal, the Appellant does not challenge the appropriateness of the summary dismissal decision of the General Division, nor does she allege that the General Division might have failed to observe a principle of natural justice, that it erred in law or that it based its decision on an erroneous finding of fact made in a perverse or capricious manner or without regard for the material before it. The Appellant acknowledges that she is not entitled to receive a Canada Pension Plan disability pension and retirement pension simultaneously.

[10] However, she suggests that she should be able to cancel her retirement pension in favour of a disability pension because she had been preoccupied and distracted by other issues which prevented her from filing an application in a timely manner. She notes that she was harassed by creditors, involved in litigation, faced the loss of her business and was fighting eviction from her premises by her landlord. She argues that her landlord discriminated against her under the *Canadian Human Rights Act* (CHRA). Facing financial difficulties, she entered into a partnership in 2012. The partnership ultimately failed and ended in litigation.

[11] The Appellant included the signature page of the questionnaire accompanying her application for a disability pension (AD1-10). She noted that anxiety, stress and the voices she hears due to her schizophrenia (with which she was diagnosed at approximately aged 12) have increased significantly. She also noted that her family physician is now recommending medication for depression, stress, anxiety and schizophrenia. In a letter dated September 3, 2015, the Appellant's family physician confirmed that the Appellant's demeanour and history is typical of someone with schizoaffective disorder and depression and/or schizophrenia. The family physician was of the opinion that the Appellant has been chronically disabled for at least the past four years and that she has a poor prognosis.

[12] The Respondent argues that the appeal should be dismissed for the following reasons:

- (a) the appeal does not raise any grounds of appeal under subsection 58(1) of the DESDA;
- (b) although the Appellant argues that there has been a violation of the CHRA, the Appeal Division has no jurisdiction under the CHRA;
- (c) the General Division did not err in its application of the law to the facts;
- (d) the appeal before the General Division had no reasonable chance of success as the Appellant's request to cancel her retirement pension for a disability pension was made after 15 months since she began receiving a Canada Pension Plan retirement pension;
- (e) the decision of the General Division is reasonable and is owed deference.

[13] The Respondent further submits that, as the Appellant's minimum qualifying period ended in December 1997, she would have had to prove that she was disabled under the *Canada Pension Plan* by no later than December 31, 1997. The Respondent argues that the Appellant could not be found disabled by the end of her minimum qualifying as she continued working well into 2013, even after she began receiving a retirement pension.

ISSUE 1: DID THE GENERAL DIVISION FAIL TO CONSIDER ANY BASIS UPON WHICH THE APPELLANT COULD HAVE QUALIFIED FOR A DISABILITY PENSION?

[14] The Appellant suggests that the General Division should have considered her personal circumstances as a valid explanation for her late application. This presupposes that there are various factors which the General Division can consider in determining whether a retirement pension can be cancelled in favour of a disability pension.

[15] A review of the *Canada Pension Plan* indicates that there are very limited circumstances where a retirement pension can be cancelled in favour of a disability pension:

- (a) under section 66.1 of the *Canada Pension Plan*, which requires an appellant to request cancellation within six months after payment of the retirement pension had started. As the Appellant had not sought to cancel her Canada Pension Plan retirement pension within six months after payments had started, she could not avail herself of this provision; and
- (b) subsection 66.1(1.1) of the *Canada Pension Plan*, which requires that an appellant be deemed to have become disabled by no later than the month before the retirement pension became payable. The *Canada Pension Plan* defines the earliest date when an appellant can be deemed disabled. Under paragraph 42(2)(b) of the *Canada Pension Plan*, a person cannot be deemed disabled more than 15 months before the date that her application for a Canada Pension Plan disability pension was received. As the General Division noted, as the Appellant had applied for a disability pension on June 13, 2013, the earliest that she could be found disabled was March 2012, which was well after the retirement pension became payable to her in April 2011.

[16] The General Division considered these provisions and determined that they were not applicable in the Appellant's circumstances.

[17] The decision of the General Division suggests that there are no other means whereby an appellant might be able to cancel her Canada Pension Plan retirement pension in favour of a disability pension. An appellant might be able to rely upon subsections 60(8) to 60(11) of the *Canada Pension Plan*. These subsections provide that, if a claimant had been incapable of forming or expressing an intention to make an application on his or her own behalf on the day on which the application was actually made, the application can be deemed to have been made in the month preceding the first month in which the relevant benefit could have been commenced to be paid or in the month that the Minister considers the person's last relevant period of incapacity to have commenced, whichever is the later. In other words, if the Appellant can establish that she was incapacitated, her application could be deemed to have been made earlier than it actually was under subsection 60(8) of the

Canada Pension Plan. The General Division did not directly address whether the Appellant might have been incapacitated.

[18] For the Appellant to be continuously incapacitated, she would have to establish that she was incapable of forming or expressing an intention to make an application for benefits. This goes well beyond establishing that she was severely disabled. Had there been any allegation from the Appellant, as well as supporting evidence, which hinted at the possibility that she might have been continuously incapacitated, it might have been a reviewable error of law for the General Division not to have conducted any analysis and not to have made findings on this issue.

[19] While there is medical evidence that the Appellant has been chronically disabled for several years, there simply is insufficient evidence to support a finding that she was continuously incapable of forming or expressing an intention to apply for a benefit. I am therefore not persuaded that the General Division erred when it did not consider the incapacity provisions.

[20] The Appellant raises several other considerations, including the fact that she was the subject of harassment and discrimination under the CHRA. The *Canada Pension Plan* however does not make any provision for these considerations as a basis upon which a retirement pension can be cancelled in favour of a disability pension and, as the Respondent notes, the Appeal Division has no jurisdiction under subsection 62(1) of the CHRA. That subsection reads:

62(1) This Part and Parts I and II do not apply to or in respect of any superannuation or pension fund or plan established by an Act of Parliament enacted before March 1, 1978.

[21] I am not persuaded that the General Division erred in failing to consider these circumstances which the Appellant faced, or that these circumstances are at all relevant considerations under the *Canada Pension Plan*.

ISSUE 2: WAS A SUMMARY DISMISSAL APPROPRIATE?

[22] The Appellant did not contest the appropriateness of the summary dismissal of her appeal before the General Division. A summary dismissal is appropriate when there are no triable issues, when there is no merit to the claim, or as subsection 53(1) of the DESDA reads, there is “no reasonable chance of success”. On the other hand, if there is a sufficient factual foundation to support an appeal and the outcome is not “manifestly clear”, then the matter is not appropriate for a summary dismissal. A weak case is not appropriately summarily dismissed, as it involves assessing the merits of the case and examining the evidence and assigning weight to it.

[23] The General Division found that there are very limited circumstances under the *Canada Pension Plan* and its Regulations where an appellant can cancel a Canada Pension Plan retirement pension in favour of a Canada Pension Plan disability pension. The General Division found that, given the factual circumstances before it, the Appellant did not fall within the exception to the general rule that once a claimant is in receipt of a Canada Pension Plan retirement pension, there is no longer any entitlement to a Canada Pension Plan disability pension. The General Division also found that it was not empowered to exercise any form of equitable power in respect of any appeals before it and that it was bound to interpret and apply the provisions of the *Canada Pension Plan*. The General Division found the provisions of the *Canada Pension Plan* to be clear and the evidence unequivocal. The General Division found that there was no chance for the Appellant to succeed on an appeal, given the law and the facts.

[24] As the General Division was satisfied that the appeal was without any merit, it rightly concluded that the appeal had no reasonable chance of success, and properly summarily dismissed it on that basis.

CONCLUSION

[25] Given the considerations above, the Appeal is dismissed.

Janet Lew
Member, Appeal Division